IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0136
Appellee,	)	DEPARTMENT A
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
GLENN MARTIN GABLE,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20054018

Honorable Howard Hantman, Judge
Honorable John Leonardo, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Alan L. Amann
Tucson
Attorneys for Appellee

Robert J. Hooker, Pima County Public Defender
By Rose Weston
Tucson
Attorneys for Appellant

P E L A N D E R, Chief Judge.

¶1 After the trial court rejected a proposed plea agreement, a jury found appellant Glenn Martin Gable guilty of four counts of aggravated driving under the influence of an intoxicant (DUI) and two counts of aggravated driving with an alcohol concentration of .08 or greater. The trial court sentenced him to six concurrent, presumptive prison terms, the longest of which was 2.5 years. None of the issues Gable raises on appeal merits reversal. We therefore affirm.

BACKGROUND

¶2 We view the facts in the light most favorable to sustaining the convictions. *See State v. Riley*, 196 Ariz. 40, ¶ 2, 992 P.2d 1135, 1137 (App. 1999). In September 2005, a United States Border Patrol agent driving on a two-lane highway noticed the headlights of a vehicle approaching in the wrong lane. The agent saw the vehicle, a pickup truck, was drawing near at a high rate of speed and pulled off the road to get out of the way. The agent turned his vehicle around, caught up to the truck, stopped it, and called the Pima County Sheriff's Department for assistance.

¶3 The agent spoke with Gable, the driver. Another man was in the passenger seat, and a woman and two small children were lying in the bed of the truck. The agent smelled alcohol in the vehicle, saw beer cans in the vehicle, and noticed that Gable had watery, bloodshot eyes and slurred speech. A deputy sheriff testified Gable had been unsteady on his feet. Subsequent testing showed Gable had a blood alcohol concentration (BAC) of .196, and a criminalist estimated his BAC at the time he drove between .206 and

.226. The state presented evidence that Gable had two prior DUI convictions within the preceding sixty months and his driver's license had been revoked.

¶4 After weeks of negotiations, the state and Gable entered into a plea agreement.[1] At a change-of-plea hearing held the day before trial, the parties submitted the agreement to the trial court. The court rejected the agreement, stating its concerns about Gable's noncompliance with Rule 28, Pima County Super. Ct. Loc. R. P., 17B A.R.S., and about the appropriateness of the agreement's terms. The court also denied Gable's request for a trial continuance.

¶5 Following the change-of-plea hearing, also on the day before trial, Gable filed a motion for change of judge for cause pursuant to Rule 10.1, Ariz. R. Crim. P., 16A A.R.S.[2] The trial court, however, began the trial as scheduled the next day without waiting for a ruling on the motion, and later that same day, the presiding judge denied Gable's motion without conducting a hearing. This appeal followed the jury's finding of guilt on all six counts.

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[1]Although Gable asserts the proposed plea agreement "provided that [he] would plead guilty to two counts of the indictment," the record neither includes the agreement nor otherwise confirms that assertion.

[2]In his motion, Gable erroneously cited Rule 10.2, Ariz. R. Crim. P., rather than Rule 10.1.

DISCUSSION

I. Rejection of proposed plea agreement

¶6 Gable first argues the trial court improperly rejected the proposed plea agreement on the ground it was untimely and unsupported by any motion under Pima County Rule 28.[3] According to Gable, that rule impermissibly conflicts with Rule 17.4, Ariz. R. Crim. P., 16A A.R.S., rendering Rule 28 "invalid and unenforceable." Citing *State v. Grell*, 212 Ariz. 516, ¶ 55, 135 P.3d 696, 708 (2006), he claims this conflict presents an issue of law subject to this court's de novo review. We need not address Gable's legal argument on the alleged conflict in the rules, however, because the record shows the court rejected the proposed agreement on its merits, not solely because of its untimeliness or any other procedural deficiency.

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[3]Rule 28, Pima County Super. Ct. Loc. R. P., 17B A.R.S., states in pertinent part:

> At arraignment, the court shall fix a date and time at least four weeks later for the defendant and counsel to appear at a pretrial conference for the setting of a trial date pursuant to Rule 8.2, Rules of Criminal Procedure, a status conference 30 days prior to trial, and such other orders necessary to facilitate completion of discovery and the orderly progress of the case to disposition. *After the status conference hearing, the court will not accept negotiated pleas, except upon written motion based upon a showing of good and sufficient cause.*

(Emphasis added.)

¶7 "The trial court has the responsibility of deciding whether to accept or reject a plea agreement, and the trial court's exercise of discretion in this regard will not be reversed except for clear abuse." *State v. Superior Court*, 183 Ariz. 327, 330, 903 P.2d 635, 638 (App. 1995). A defendant may participate in plea negotiations pursuant to Rule 17.4(a), Ariz. R. Crim. P. "There is, of course, no absolute right to have a guilty plea accepted. A court may reject a plea in exercise of sound judicial discretion." *Santobello v. New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 498 (1971); *see also State v. Morse*, 127 Ariz. 25, 31, 617 P.2d 1141, 1147 (1980). Rule 17.4(d) authorizes a trial court to approve or reject a plea in the interests of justice. *State v. Lee*, 191 Ariz. 542, ¶ 7, 959 P.2d 799, 801 (1998).

¶8 A trial judge, however, cannot reject a plea agreement without giving "'individualized consideration to its merits.'" *State v. Darelli*, 205 Ariz. 458, ¶ 19, 72 P.3d 1277, 1282 (App. 2003), *quoting Espinoza v. Martin*, 182 Ariz. 145, 148, 894 P.2d 688, 691 (1995). This means a trial court must adequately investigate the facts that enable the court to make an intelligent decision. *Superior Court*, 183 Ariz. at 330, 903 P.2d at 638. For example, in *Darelli*, Division One of this court found that the trial court had abused its discretion by implementing a plea cut-off date and rejecting all potential pleas except a guilty plea to the charges, based solely on the fact that a jury panel was assembled and waiting. 205 Ariz. 458, ¶ 15, 72 P.3d at 1281. The court concluded that the trial judge had

improperly made his decision on procedural reasons that had nothing to do with the "'individualized consideration'" required to accept or reject a plea agreement. *Id.* ¶¶ 16-17.

¶9 Relying on Rule 17.4(a) and *Darelli*, Gable argues the trial court improperly and arbitrarily rejected the negotiated plea agreement based solely on his failure to timely file a written motion, as Pima County Rule 28 required under the circumstances. The record, however, shows the court adequately investigated the facts and rejected the guilty plea on the merits. In making its decision, the court considered several factors, including Gable's two prior DUI convictions, his high BAC, the two young children in the vehicle, the fact that a Border Patrol agent had to swerve off the road to avoid a collision, and Gable's eligibility for probation under the proposed agreement. In view of those factors, the court rejected the agreement, succinctly stating, "It's not appropriate."[4] On this record, we cannot say the court abused its discretion because it gave individualized consideration to the merits of the plea agreement before rejecting it.

¶10 Gable also argues he was prejudiced by having detrimentally relied on the rejected plea agreement. He claims he "could not have known that the trial court would reject the [plea]" and did not continue preparing for trial after the parties reached the

[4]As Gable points out, the trial court also said during trial that Pima County Rule 28 had been the "lynch pin" of its refusal to accept the plea agreement and that the lack of any timely written motion "was the major reason to deny it." Nonetheless, the court clearly articulated as a proper and independent basis for its rejecting the agreement that the circumstances relating to Gable and his current offenses did not justify accepting the agreement.

agreement. In support of this argument, Gable cites several inapposite cases in which courts considered a defendant's detrimental reliance on an accepted plea offer as a ground for finding a binding and enforceable contract. *See, e.g.*, *Ex parte Johnson*, 669 So. 2d 205, 206 (Ala. 1995); *State v. Superior Court*, 160 Ariz. 71, 72, 770 P.2d 375, 376 (App. 1988); *Badger v. State*, 637 N.E.2d 800, 803 (Ind. 1994). Those cases are distinguishable, however, because the courts there merely found the agreements in question, though not yet accepted by the trial court, binding and enforceable against the prosecution, not against the court itself. Those cases do not support Gable's argument that detrimental reliance resulting from a party's anticipation that a trial court will accept a proposed plea agreement should somehow estop the court from rejecting the agreement.

¶11 In addition, Gable's argument is inconsistent with a trial court's authority to approve or reject a proposed plea agreement in the interests of justice. *See Lee*, 191 Ariz. 542, ¶ 7, 959 P.2d at 801. As we previously stated, there is no absolute right to have a guilty plea accepted. *See Santobello*, 404 U.S. at 262, 92 S. Ct. at 498. The trial court had authority to reject the agreement and did not abuse its discretion in doing so. *See Lee*, 191 Ariz. 542, ¶ 7, 959 P.2d at 801; *Darelli*, 205 Ariz. 458, ¶ 19, 72 P.3d at 1282; *Superior Court*, 183 Ariz. at 330, 903 P.2d at 638. Gable, therefore, had nothing to rely on but his hope that the court would accept his guilty plea. Consequently, the court's refusal to accept the plea agreement and its decision to proceed with trial did not constitute an abuse of

discretion or unduly prejudice Gable because there was no certainty the court would accept the guilty plea.

II. Motion to change judge for cause

¶12 As noted earlier, after the trial court rejected the proposed plea agreement, Gable filed a motion for change of judge for cause pursuant to Rule 10.1, Ariz. R. Crim. P. In his motion, Gable claimed the trial judge's statements during the change-of-plea hearing demonstrated that he could not serve as a fair and impartial judge because of his negative feelings about Gable and the charges against him. The next day, after trial had commenced, the presiding judge denied Gable's motion without a hearing, finding that the claim of bias was speculative and did not present legally sufficient grounds for requiring removal of the trial judge.

¶13 Presumably because he did not specifically request a hearing, Gable argues the presiding judge's denial of his motion without a hearing constitutes structural or fundamental error because it violated his constitutional right to a fair trial by an impartial judge. Structural error is that which "'infect[s] the entire trial process'" and "'necessarily render[s it] fundamentally unfair.'" *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 1833 (1999), *quoting Brecht v. Abrahamson*, 507 U.S. 619, 630, 113 S. Ct. 1710, 1717 (1993), and *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 3106 (1986); *see also State*

v. Anderson, 197 Ariz. 314, ¶ 22, 4 P.3d 369, 378 (2000). In contrast, fundamental error is that which reaches the foundation of the case, deprives the defendant of an essential right, and is of such a magnitude that a fair trial becomes impossible. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). A claim of fundamental error requires a showing of both fundamental error and resulting prejudice. *Id.* ¶¶ 19-20, 22. Before engaging in a fundamental error analysis, however, we must first find some error occurred. *Id.* ¶ 23; *see also State v. Lavers*, 168 Ariz. 376, 385, 814 P.2d 333, 342 (1991).

¶14 Rule 10.1(a), Ariz. R. Crim. P., provides that a defendant "shall be entitled to a change of judge if a fair and impartial hearing or trial cannot be had by reason of the interest or prejudice of the assigned judge." A trial judge, however, "'is presumed to be free of bias and prejudice.'" *State v. Medina*, 193 Ariz. 504, ¶ 11, 975 P.2d 94, 100 (1999), *quoting State v. Rossi*, 154 Ariz. 245, 247, 741 P.2d 1223, 1225 (1987). "To rebut this presumption, a party must set forth a specific basis for the claim of partiality and prove by a preponderance of the evidence that the judge is biased or prejudiced." *Id.* Although Rule 10.1(c) states that "the presiding judge shall provide for a hearing" after a party files a motion for change of judge, a hearing is required "only when [the] motion alleges facts which, if taken as true, would entitle the defendant to relief." *State v. Eastlack*, 180 Ariz. 243, 255, 883 P.2d 999, 1011 (1994).

¶15 "Bias and prejudice" in this context mean "hostile feeling[s] or a spirit of ill will, or undue friendship or favoritism . . . toward one of the litigants." *State v. Hill*, 174

Ariz. 313, 322, 848 P.2d 1375, 1384 (1993). Moreover, "the bias and prejudice necessary to disqualify a judge must arise from an extra-judicial source" and not from any actions the judge has taken in the case. *Smith v. Smith*, 115 Ariz. 299, 303, 564 P.2d 1266, 1270 (1977). For example, """[o]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings . . . do not constitute a basis for a [finding of] bias or partiality . . . unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible."""" *State v. Ramsey*, 211 Ariz. 529, ¶ 38, 124 P.3d 756, 768 (App. 2005), *quoting State v. Henry*, 189 Ariz. 542, 546, 944 P.2d 57, 61 (1997), *quoting Liteky v. United States*, 510 U.S. 540, 555-56, 114 S. Ct. 1147, 1157 (1994) (alteration in *Ramsey*); *see also State v. Peralta*, 175 Ariz. 316, 319, 856 P.2d 1194, 1197 (App. 1993) ("The fact that a judge may have strong feelings about a case or an opinion about the merits does not mean that the judge is biased and prejudiced and must remove himself from the case.").

¶16 Gable points to statements that purportedly show the trial judge's bias and prejudgment of the case. For example, at the change-of-plea hearing, after being informed that the state had approved the proposed plea agreement, the judge declared, "I wonder why." Gable also claims the judge's rejection of the plea agreement itself gave rise to concerns about his "strong negative attitude toward [Gable]," and Gable "suspected that the court had prejudged the case and was biased." These allegations, however, do not sufficiently show any bias or prejudice that would merit a change of judge because they are

based purely on speculation and suspicion. *See Medina*, 193 Ariz. 504, ¶ 12, 975 P.2d at 100.

¶17 Furthermore, Gable's claims do not suggest any bias or prejudice arising from an extrajudicial source, and nothing in the record suggests the trial judge harbored a deep-seated favoritism or antagonism toward Gable. *See State v. Ellison*, 213 Ariz. 116, ¶ 40, 140 P.3d 899, 912 (2006); *Ramsey*, 211 Ariz. 529, ¶ 38, 124 P.3d at 768. Consequently, the presiding judge was not obligated to conduct a hearing. *See Eastlack*, 180 Ariz. at 255, 883 P.2d at 1011 ("We will not require presiding judges to hold meaningless hearings when no grounds for relief are stated in the first instance."). Because the presiding judge committed no error in failing to conduct a hearing on Gable's motion for change of judge before denying it, Gable's claim of structural or fundamental error necessarily fails.

¶18 In a related argument, directly contradicting a statement defense counsel made below,[5] Gable contends the trial court violated the "implicit . . . procedure set forth in Rule 10.1" and abused its discretion by proceeding with trial before the presiding judge ruled on his motion for change of judge. Because Gable not only failed to object on this basis below, but rather, acquiesced in the trial court's action, he "forfeit[ed] the right to obtain appellate relief" on this issue absent fundamental error, which he neither asserts nor argues. *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. In any event, this claim is meritless. *See*

[5]When the trial court asked both parties at the beginning of the first day of trial if they had a problem starting trial even though Gable's motion for change of judge was still pending, defense counsel said, "No, Your Honor."

State v. Myers, 117 Ariz. 79, 87, 570 P.2d 1252, 1260 (1977) (Rule 10.1 does not entitle party to continuance of any length after filing motion for change of judge for cause).

¶19 Finally, we reject Gable's assertion that the trial court's decision to proceed with trial pressured the presiding judge into summarily rejecting the motion for change of judge. Gable likewise forfeited that claim by failing to raise it below, and in any event, the record reflects that the presiding judge gave ample consideration to Gable's motion and correctly denied it.

DISPOSITION

¶20 Gable's convictions and sentences are affirmed.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge